

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA

CASE NO. CR18-5579 RJB

Plaintiff,

ORDER DENYING EMERGENCY  
MOTION FOR COMPASSIONATE  
RELEASE PURSUANT TO 18  
U.S.C § 3582 (C)(1)

# OSCAR HUMBERTO CARRILLO SALCEDO

Defendant

THIS MATTER comes before the Court on the above-referenced motion (Dkt. 1180).

The Court is familiar with the records and files herein and all documents filed in support of, and in opposition to, the motion.

## THE LAW<sup>1</sup>

In pertinent part, 18 U.S.C. § 3582(c)(1) reads as follows:

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative

<sup>1</sup> The sections herein on The Law and Discussion – Legal Issues are taken from this Court’s Order Granting Motion for Compassionate Release (Dkt 209) in *United States v McPherson*, WDMA Cause Number CR94-5708RJB, and are equally applicable here.

1 rights to appeal a failure of the Bureau of Prisons to bring a motion on the  
 2 defendant's behalf or the lapse of 30 days from the receipt of such a request by the  
 3 warden of the defendant's facility, whichever is earlier, may reduce the term of  
 4 imprisonment (and may impose a term of probation or supervised release with or  
 5 without conditions that does not exceed the unserved portion of the original term  
 6 of imprisonment), after considering the factors set forth in section 3553(a) to the  
 7 extent that they are applicable, if it finds that—

- (i) extraordinary and compelling reasons warrant such a reduction; or
- (ii) . . . .

8 and that such a reduction is consistent with applicable policy statements issued by  
 9 the Sentencing Commission[.]

10 The Policy Statement referenced by the statute is USSG § 1B1.13 was required by 28  
 11 U.S.C. § 944(f), which provides:

12 The Commission, in promulgating general policy statements regarding the sentencing  
 13 modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be  
 14 considered extraordinary and compelling reasons for sentence reduction, including the  
 15 criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone  
 16 shall not be considered an extraordinary and compelling reason.

17 In pertinent part, the policy statement at USSG § 1B1.13 provides:

18 Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A),  
 19 the court may reduce a term of imprisonment (and may impose a term of supervised  
 20 release with or without conditions that does not exceed the unserved portion of the  
 21 original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. §  
 22 3553(a), to the extent that they are applicable, the court determines that--

- (1) (A) Extraordinary and compelling reasons warrant the reduction; or . . .
- (2) The defendant is not a danger to the safety of any other person or to the  
 23 community, as provided in 18 U.S.C. § 3142(g); and
- (3) The reduction is consistent with this policy statement.

## 18 **Commentary**

### 19 **Application Notes:**

20 **1. Extraordinary and Compelling Reasons.** – Provided the defendant meets the  
 21 requirements of subdivision (2), extraordinary and compelling reasons exist under any of  
 22 the circumstances set forth below:

23 (A) **Medical Condition of the Defendant –**

24 (i) The defendant is suffering from a terminal illness (i.e., a serious and  
 25 advance illness with an end of life trajectory). A specific prognosis of life expectancy  
 26 (i.e., a probability of death within a specific time period) is not required. Examples  
 27 include metastatic solid-tumor cancer, amyotrophic later sclerosis (ALS), end-stage organ  
 28 disease, and advance dementia.

1 (ii) The defendant is –

- 2 (I) suffering from a serious physical or medical condition,  
3 (II) suffering from a serious functional or cognitive impairment, or  
4 (III) experiencing deteriorating physical or mental health because  
5 of the aging process

6 that substantially diminishes the ability of the defendant to provide self-care within the  
7 environment of a correctional facility and from which he or she is not expected to  
8 recover.

9 (B) **Age of the Defendant.**—The defendant is (i) at least 65 years old; (ii) is  
10 experiencing a serious deterioration in physical or mental health because of the aging  
11 process; and (iii) has served at least 10 years or 75 percent of his or her term of  
imprisonment, whichever is less.

12 (C) **Family Circumstances** –

13 (i) The death or incapacitation of the caregiver of the defendant's minor  
14 child or minor children.

15 (ii) The incapacitation of the defendant's spouse or registered partner  
when the defendant would be the only available caregiver for the spouse or registered  
16 partner.

17 (D) **Other Reasons.**—As determined by the Director of the Bureau of Prisons,  
18 there exists in the defendant's case an extraordinary and compelling reasons other than,  
19 or in combination with, the reasons described in subdivision (A) through (C).

20 **2. Foreseeability of Extraordinary and Compelling Reasons.**—For purposes of this  
21 policy statement, an extraordinary and compelling reason need not have been unforeseen  
22 at the time of sentencing in order to warrant a reduction in the term of imprisonment.  
Therefore, the fact that an extraordinary and compelling reason reasonably could have  
been known or anticipated by the sentencing court does not preclude consideration for a  
reduction under this policy statement.

23 **3. Rehabilitation of Defendant.**—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the  
24 defendant is not, by itself, an extraordinary and compelling reason for purposes of this  
policy statement.

25 **4. Motion by the Director or the Bureau of Prisons.**—A reduction under this policy  
statement may be granted only upon motion by the Director of the Bureau of Prisons  
26 pursuant to 18 U.S.C. § 3582(c )(1)(A). The Commission encourages the Director of the  
27 Bureau of Prisons to file such a motion if the defendant meets any of the circumstances  
28 set forth in Application Note 1. The court is in a unique position to determine whether  
the circumstances warrant a reduction (and, if so, the amount of reduction), after  
29 considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this  
30 policy statement, such as the defendant's medical condition, the defendant's family  
31 circumstances, and whether the defendant is a danger to the safety of any other person or  
32 to the community.

33 This policy statement shall not be construed to confer upon the defendant any right not  
34 otherwise recognized in law.

**5. Application of Subdivision (3).**—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

## DISCUSSION – LEGAL ISSUES

First, because of the existing Policy Statements at USSG § 1B1.13 were adopted before 18 U.S.C. § 3582 (c)(1), parts of the Policy Statements are obsolete and must be disregarded.

The parts to be disregarded are underlined, above.

Second, 28 U.S.C. § 944(f) required the Sentencing Commission in the Policy Statement, to include “the criteria to be applied” in considering extraordinary and compelling reasons for sentence reduction. This the Commission failed to do, except for determining, in Application Note 4, that, “The court is in an unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement” followed by a non-exclusive list of things the Court should consider. This listing of things the Court should consider hardly sets the criteria for a finding of extraordinary and compelling reasons for a sentence reduction, leaving it to the Court to determine what qualifies, after appropriate analysis.

Third, these further observations support this conclusion: First, the listing of examples of extraordinary and compelling reasons in the Policy Statements § 1B113 and Application notes is not, by its language, exclusive. Second, the listing of things that are not considered extraordinary and compelling does not limit what else may be considered extraordinary and compelling. Third, Application Note 1(D) clearly opens the door to consider reasons other than the examples listed in determining whether extraordinary and compelling reasons for a sentence reduction exists.

“Extraordinary and compelling” means “extraordinary and compelling.”

1 DISCUSSION

2 In this case, Defendant Salcedo seeks early release from a 36-month prison sentence. He  
3 has served approximately 21 months. He asks for release on the grounds listed below. The  
4 Court's comments and findings on each ground follow the ground listed.

5 **A. The Catch-All Provision of U.S.S.G. § 1B1.13 Allows The Court To Find  
6 Extraordinary and Compelling Circumstances Warranting Compassionate Release.**

7 The Court basically agrees with the Defendant's analysis as is reflected in the foregoing  
8 Discussion – Legal Issues.

9 **B. The Extraordinary and Compelling Circumstances of Carrillo Salcedo's  
10 Contraction Of And Suffering From The Novel Coronavirus In Confinement At  
11 FDC SeaTac Justify Compassionate Release.**

12 The Court has read and re-read the parties' submissions on COVID-19 and the  
13 Defendant's COVID-19 experiences at FDC SeaTac. Defendant has had a tough time of it.  
14 Nevertheless, in spite of all the long national, international, and FDC SeaTac statistics, in spite of  
15 Defendant's experience with the virus, and in spite of the circumstances Defendant has faced at  
16 FDC SeaTac, it is this Court's opinion that all of that information does not show extraordinary  
17 and compelling circumstances justifying an early release. What the information shows is a  
18 prison system struggling, with mixed results, to protect the offenders it houses. Some of the  
19 protection efforts are hard on the inmates, including Defendant, but his incarceration and  
20 COVID-19 treatment, just don't rise to the level of "extraordinary and compelling."

21 **C. Carrillo Salcedo is Not a Danger to the Safety of Another Person or to the  
22 Community.**

23 It appears premature, with a warrant out for Defendant in Utah, to make a finding that  
24 Defendant is no longer a danger to the community. The Court does not know enough about  
25 Defendant to make, in good conscience, such a finding.

#### **IV. THE COURT CAN, AND SHOULD, EXCUSE THE 30-DAY TIME PROVISION.**

Defendant argues that there are three exceptions to exhaustion of the 30-day requirement in compassionate release cases, which apply here, citing *Perez* 2020 WL1546422 at \*2: futility, undue prejudice, and incapacity to grant relief. Apparently, Defendant’s counsel sent a request for compassionate release to the FDC SeaTac warden on or about September 6, 2020.

There is no showing that the request is futile, though such requests may be seldom granted.

Nor is there a showing of undue prejudice caused by the 30-day rule. Defendant's situation at FDC SeaTac will not likely change over the few days until the 30-day period elapses.

Further relief could be granted by the warden – there is no incapacity to grant relief.

The Court sees no good reason to waive or excuse the 30-day requirement.

## ORDER

For the foregoing reasons, Defendant's Emergency Motion for Compassionate Release Pursuant to 18 U.S.C § 3582 (C)(1) is DENIED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 22<sup>nd</sup> day of September, 2020.

Robert Bryan

ROBERT J. BRYAN  
United States District Judge